

**IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT**

No. ED 81854

**IN THE MATTER OF THE CARE AND TREATMENT OF
MICHAEL G. NORTON,**

Appellant,

v.

STATE OF MISSOURI,

Respondent.

RESPONDENT-S BRIEF

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JURISDICTIONAL STATEMENT

Michael Norton appeals from a judgment of the Clark County Circuit Court, which entered a jury verdict finding that Mr. Norton is a sexually violent predator pursuant to ' ' 632.480 to 632.513. Appellant Norton challenges the Sexually Violent Predator law as violating equal protection and due process under the Missouri and United States Constitutions. While jurisdiction would normally rest in the Missouri Supreme Court under Article V, ' 3 of the Missouri Constitution, this Court has jurisdiction because Norton's claims are not real and substantial. *Wright v. Dept. of Social Services*, 25 S.W.3d 525, 528 (Mo. Ct. App. W.D. 2000). Respondent expands on this issue in its Response to Appellant's Memorandum on Jurisdiction filed separately with this Court.

STATEMENT OF FACTS

In his appeal, Mr. Norton alleges that various aspects of the sexually violent predator law violate his rights to equal protection. As the facts are largely ancillary to this appeal, it is curious that Norton's Statement of Facts includes many facts not relevant to his argument. Respondent sets forth the following facts relevant to this appeal.

On May 3, 2001, the State of Missouri filed a petition in the Probate Court of Clark County seeking to confine Mr. Norton as a sexually violent predator pursuant to ' ' 632.480 to 632.513. (L.F. 20-23).¹ At this time, Mr. Norton was completing a five year sentence for child molestation in the first degree. (L.F. 26). The petition was filed fifteen days before Mr. Norton's release date. (L.F. 21).

The State attached an end of confinement report to its petition. The end of confinement report included an original report (L.F. 34-40) and an Addendum to the Report (L.F. 25-33). The original Report was prepared by Gerald E. Hoeflein, an associate psychologist, on June 27, 2000. (L.F. 34, 40). Linda Kelley, a licensed clinical social worker, prepared the addendum on March 28, 2001. (L.F. 25, 33). Both the original

¹ The record on appeal includes a Legal File (L.F.) and a Trial Transcript (Tr.).

report and addendum concluded that Mr. Norton may meet the criteria of a sexually violent predator as defined in ' 632.480(5). (L.F. 33, 40).

While serving his sentence, Mr. Norton participated in the Missouri Sex Offender Program (MOSOP). (L.F. 34-35). While he completed phase I of the program, he failed at two attempts to complete phase II. (L.F. 34-35).

In considering the evidence, the court determined that there was probable cause to believe Mr. Norton was a sexually violent predator. (L.F. 157). At trial, Linda Kelley testified regarding her interview of Mr. Norton. (Tr. 427-475). She testified that she had completed between fifty and sixty end of confinement reports but that she found that the offender met the criteria of a sexually violent predator in only five. (L.F. 434).

The court entered a final judgment, pursuant to a jury verdict, that Mr. Norton is a sexually violent predator on June 26, 2002. (L.F. 19, 378). The court overruled his objection that no judgment be entered because the court failed to consider a less restrictive environment for treatment. (L.F. 19, Tr. 824). Mr. Norton appeals from that verdict (L.F. 376-380).

INTRODUCTION

Mr. Norton raises three points on appeal. Points I and II raise equal protection challenges **B** namely, that the Sexually Violent Predator law violates equal protection in that it does not allow Mr. Norton to be committed anywhere other than a secure facility, and that it allows the State to use a licensed clinical social worker rather than a psychiatrist or psychologist to evaluate him in determining if he may be a sexually violent predator.

In Point III, Mr. Norton makes two distinct arguments. First, he argues that the state's failure to provide him an attorney at his end of confinement interview violates due process. Second, he claims that the law violates equal protection because others subject to civil commitment proceedings in Chapter 632 are provided a right to counsel.

Respondent takes the position, both here and in its Response to Appellant's Memorandum on Jurisdiction, that this Court has jurisdiction to dispose of Norton's equal protection claims and due process claim because these challenges do not raise a legitimate constitutional question. Respondent will address Norton's equal protection claims in Point II of this brief.

Aside from Norton's equal protection arguments, the law does not provide Mr. Norton with a right to counsel at the end of confinement interview because that interview is not a proceeding within the meaning of ' 632.492. As this is an issue of statutory construction, Respondent addresses this issue in Point I.

I.

The probate court did not err in denying Mr. Norton's motion to exclude statements he made in an end of confinement interview because this interview did not violate Mr. Norton's right to due process of law in that the interview was not a proceeding that triggered his right to counsel.

Norton raises two separate issues in Point III. First, he argues that statements to a licensed clinical social worker at the Department of Corrections (DOC) at an end of confinement interview that he victimized a 15 year old and 16 year old should have been excluded at trial because he did not have access to an attorney. Appellant's Brief at 48. He claims that the probate court's failure to exclude these statements violated his due process rights under Art. I, ' 10 of the Missouri Constitution and the 14th Amendment of the United States Constitution. As Respondent will show, Mr. Norton is not entitled to an attorney at the end of confinement interview because it is not a proceeding as described in the Sexually Violent Predator law.

Second, Norton argues that failure to provide him with counsel at the end of commitment interview before any civil commitment proceedings are initiated denies him equal protection under the law because other committed persons not alleged to be sexually violent predators are entitled to contact an attorney within a short time after their commitment. Respondent will respond to Norton's equal protection claims in Point II.

Norton argues that the Sexually Violent Predator law entitled him to the assistance of counsel when the DOC conducted its end of confinement interview to determine whether he may be a sexually violent predator. Specifically, he cites ' 632.492 which, in pertinent

part, provides: "At all stages of the proceedings pursuant to sections 632.480 to 632.513, any person subject to sections 632.480 to 632.513 shall be entitled to the assistance of counsel, and if the person is indigent, the court shall appoint counsel to assist such person." *Id.*² Norton claims "proceedings" should be read to include an end of confinement interview. This Court should decline to accept Norton's reading of this provision because it does not comport with the rules of statutory construction.

Statutes are to be construed in their plain and ordinary meaning. *Ste. Genevieve School Dist. R-II v. Board of Aldermen of the City of Ste. Genevieve*, 66 S.W.3d 6, 11 (Mo. banc 2002). If a term is not defined by statute, it is to be read according to its plain and ordinary dictionary meaning. *State of Missouri, Department of Social Services v. Carroll Care Centers, Inc.*, 11 S.W. 3d 844, 850 (Mo. Ct. App. W.D. 2000). The term "proceeding" means: "Legal action; litigation" and "the instituting or conducting of legal action." AMERICAN HERITAGE DICTIONARY, Third Edition 1444 (1996).

Norton's argument rests on the mistaken notion that, because the end of confinement interview may have supported the DOC's decision to refer Mr. Norton on to the Attorney General as someone who may be sexually violent predator under § 632.483, that somehow

² As the facts giving rise to this appeal took place in 2001, all statutory references are to the 2000 Revised Missouri Statutes unless otherwise noted.

constituted a proceeding that triggered Mr. Norton's right to counsel.

This argument misreads ' 632.492 and, if accepted by this Court, would lead to absurd results.

Since a proceeding is a legal action, the most logical reading of ' 632.492 is that it provides Mr. Norton a right to counsel at all stages of **legal proceedings** under the Sexually Violent Predator law. This provision is triggered only when the Attorney General decides to file a petition pursuant to ' 632.486 alleging that a person is a sexually violent predator. Unless and until this petition is filed, there is no proceeding.

Once the Attorney General files the petition, two distinct legal proceedings follow **B** a probable cause hearing to determine whether probable cause exists to believe that the person is a sexually violent predator and, if the court finds that probable cause exists, a trial to determine if, beyond a reasonable doubt, the person is a sexually violent predator. *See* ' ' 632.489 and 632.492, RSMo. If the person is committed to the custody of the Department of Mental Health (DMH) as a sexually violent predator to receive further treatment, he is entitled to additional legal proceedings in the form of an annual court review of his condition and is specifically provided the right to an attorney at the those hearings. ' 632.498. Notably, this section provides: **A . . . At the hearing, the committed person shall be entitled to be present and entitled to the benefit of all constitutional protections that were afforded the person at the **initial commitment proceeding** .@*Id.*** (Emphasis added). The term proceeding as used here means **A**court proceeding@just as it does in ' 632.492. The use of the word **A**initial@here is not only consistent with the phrase **AA**At all proceedings . . .@in ' 632.492 but makes clear that there is no proceeding until a

petition is filed. Norton's argument that a proceeding occurs prior to this time is without merit.

Moreover, ' 632.492, by its own terms and contrary to Norton's reading, indicates the Legislature's intent that **A**proceeding@mean a court proceeding. The statute, attached to Appellant's Brief at A-20 and also to this brief at A-4, solely addresses proceedings at trial. It sets out when the trial shall be held, that it may be continued, the right of the person to the assistance of counsel or, if indigent, appointed counsel, that either party has a right to demand a jury trial, and instructions to the jury if a jury trial. Missouri courts look not only at the words in a statute, but their context as well in determining legislative intent. *Hyde Park Partnership v. Director of Revenue*, 850 S.W.2d 82, 84 (Mo. banc 1993). The focus of ' 632.492 is the trial process and the rights of both parties at trial. Norton's attempt to bootstrap the right to counsel afforded at the probable cause hearing, trial and annual review **B** all legal proceedings **B** onto his end of confinement interview which occurs before any decision has been made to initiate a legal proceeding should be rejected.

This court should uphold the probate court's refusal to strike statements that Mr. Norton made in his end of confinement interview because he is not entitled to consult with counsel at the interview.

II.

The Sexually Violent Predator law does not violate Mr. Norton's rights to equal protection in that he has the same rights as other sexually violent predators and, to the extent other committed persons are treated differently, the state has a rational basis for distinguishing between sexually violent predators and others.

Standard of Review

Each of Appellant's three points on appeal raise an equal protection challenge. In making such a challenge, Appellant attacks the constitutionality of the Sexually Violent Predator law. In raising this challenge, Mr. Norton bears an extremely heavy burden.[@] *Etling v. Westport Heating & Cooling Services, Inc.*, 92 S.W.3d 771, 773 (Mo. banc 2003) (quoting *Linton v. Missouri Veterinary Med. Bd.*, 988 S.W.2d 513, 515 (Mo. banc 1999) (citation omitted)).

In an equal protection challenge, the court first considers whether the statutory scheme impacts some fundamental right or operates to the detriment of some suspect class. *Wright v. Missouri Dept. of Social Services*, 25 S.W.3d 525, 528 (Mo. Ct. App. W.D. 2000). If the statute does not, the court's only question is whether the classification is rationally related to a legitimate state interest. *Id.*

i.

Mr. Norton was not denied equal protection at his end of confinement interview because he is not similarly situated to other persons committed under Chapter 632 who are, by statute, specifically granted the right to counsel

In Appellant's Point III, Norton argues that, even if this Court rules that his right to counsel does not extend to the end of confinement interview, it should hold that the law violates equal protection because other committed persons are specifically granted a right to counsel within a short time after commitment. In reviewing an equal protection claim, the Court must first determine if the statute complained of negatively impacts one of Norton's fundamental rights or operates to his detriment as part of a suspect class. *Wright*, 25 S.W.3d at 528. Mr. Norton challenges ' 632.483 because he claims this section treats him differently (i.e. in not affording him the right to counsel) than other persons rendered dangerous by a mental disorder. @ *Appellant's Brief* at 52. Because he does not claim a fundamental right has been violated, Respondent limits its response to the suspect class issue.

As a preliminary matter, Norton's challenge does not meet the suspect class criteria under equal protection. Norton attempts to make the case that he should be afforded the same rights to counsel that are afforded to a person who is civilly detained pursuant to ' ' 632.300 - 632.475. But he fails to show that he has been treated differently than anyone else in his class - other sexual predators subject to the provisions of ' ' 632.480 - 632.513. Norton claims that there is no rational basis to deny sexually violent predators the same

rights to counsel as others with mental conditions simply because sexually violent predators may be more dangerous as a class. *Appellant's Brief* at 53. He does not claim that other sexual predators are granted rights to counsel that he is not.

An equal protection claim can only be sustained if the statute treats plaintiff in error differently from what it does others who are in the same situation as he. *Lloyd v. Dollison*, 194 U.S. 445, 447 (1904). The equal protection analysis must begin by determining what class of persons is covered by the challenged statute and then comparing the status of the challenger to the treatment of the class. For the class of sexually violent predators, the law covers only those persons who have committed sexually violent offenses and who are then found beyond a reasonable doubt to be likely . . . to engage in predatory acts of sexual violence if not confined in a secure facility.

' 632.480(5). The Legislature's decision to enact distinct provisions for sexually violent predators indicates its desire to separate this group from others with mental conditions, even those with mental conditions that render them dangerous to themselves or others. This Court should decline Norton's invitation to blend his class with the broader class subject to these general civil detention procedures.

Sexually violent predators are not a suspect class. *State ex. rel. Nixon v. Askren*, 27 S.W.3d 834, 842 (Mo. Ct. App. W.D. 2000). Therefore, the state need only show a rational basis to justify why sexually violent predators are treated differently from others committed for mental health reasons. *Id.* Norton asserts that he should have been granted an attorney during his end of confinement interview because those committed under the

civil detention law are provided assistance in contacting an attorney within three hours after arriving at the mental health facility. *Appellant's Brief* at 52. But a closer look at ' 632.320 and the preceding statutes show that the person subject to the provisions of ' 632.320 **has already** become the subject of a legal proceeding. Because a person who is screened as to whether he **might be** a sexually violent predator is not yet the subject of a legal proceeding, this distinction provides a rational basis for providing a person under ' 632.320 with counsel but not a person, like Mr. Norton, who might be subject to a legal proceeding in the future.

The relevant part of ' 632.320 provides:

1. Within three hours of the time at which **the respondent** arrives at a mental health facility he shall . . . (3) Be provided assistance in contacting the appointed attorney or an attorney of his own choosing, if so requested.

Emphasis added. Note that by the time ' 632.320 is triggered, the person is already designated as a respondent to a legal action. A review of the preceding sections explains how the person becomes a respondent.

First, a person may file an application in court to detain another for detention and treatment under ' 632.305. Filing the application authorizes the person to bring the matter before the probate court on an ex parte basis to determine whether the person, already referred to as the respondent, should be taken into custody. ' 632.305.2. If the court finds probable cause, based on testimony or affidavits, to believe that the respondent may be suffering from a mental disorder and presents a likelihood of serious harm to himself or

others, it shall direct a peace officer to take the person into custody. *Id.* The court may, in its discretion, provide the respondent an opportunity to be heard. *Id.* If the court authorizes the initial detention, the respondent shall be placed in a mental health facility for evaluation.

' 632.310.1. Only after all these steps have occurred and the respondent arrives at a mental health facility is he provided the right to contact an attorney.³

The Legislature has provided Mr. Norton with the opportunity to consult with counsel at any court proceeding, including the probable cause hearing. ' 632.492. Nothing in the statutory scheme of the Civil Detention law appears to provide those respondents with any more rights to counsel than those subject to civil commitment under the Sexually Violent Predator law.

Norton fails to show how ' 632.320, when read in its broader context, provides those detainees with superior rights to sexually violent predators. This Court should uphold ' 632.483 against Mr. Norton's equal protection challenge.

³ The term "respondent" is defined in ' 632.005 to mean: "an individual against whom involuntary civil detention proceedings are instituted pursuant to this chapter." The clear implication of this term is that proceedings refer to legal proceedings.

ii.

The probate court did not err when it committed Mr. Norton to a secure Department of Mental Health facility without first considering less restrictive alternatives because such confinement does not violate Mr. Norton's equal protection rights in that the Legislature has determined that the least restrictive alternative for sexually violent predators is a secure facility and this determination is rationally related to a legitimate state interest.

In Point I of Appellant's Brief, Mr. Norton argues that his right to have the probate court consider less restrictive alternatives is fundamental. He cites *Foucha v. Louisiana*, 504 U.S. 71, 79 (1992) for the proposition that freedom from physical restraint is a fundamental right. Appellant's Brief at 32. *Foucha* does not establish that a person has a fundamental right for a court to consider less restrictive alternatives where the state has created a separate class that requires commitment in a secure facility.

While Mr. Norton cites cases from the State of Washington which hold that sexually violent predators are entitled to the same consideration of least restrictive alternatives as other inmates, these cases are not binding on this court. Notably, other states that have considered this issue have reached the opposite conclusion when deciding if they may enact distinct provisions for sexually violent predators. See *State v. Post*, 541 N.W.2d 115, 130 (WI 1995) (In upholding the constitutionality of Wisconsin's law, the court noted: "This heightened level of dangerousness and the unique treatment

needs of sexually violent persons justify distinct legislative approaches to further the compelling governmental purpose of protection of the public.®).

For many years, courts have considered the potential harm identified in a particular class as a justifiable reason for the to create a particular statutory scheme to deal with that class. In *State ex. rel. Pearson v. Probate Court of Ramsey County*, 309 U.S. 270, 275 (1940), the Court stated:

As we have often said, the is free to recognize degrees of harm, and may only confine its restrictions to those classes of cases where the need is deemed to be clearest. If the law ¸presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied.=
Id. (Citing *Miller v. Wilson*, 236 U.S. 373, 384 (1915)). The Missouri Legislature, like legislatures in a number of other states, has required that sexually violent predators, if committed to the DMH, be confined to a secure facility so that they may receive the individualized treatment they need in a setting where there is a minimal threat of escape. The state has compelling interest in ensuring the secure confinement of Mr. Norton until his mental abnormality has so changed that he is Asafe to be at large and will not engage in acts of sexual violence if discharged.® ' 632.498. That at least one sexually violent predator has escaped while appealing his commitment bears out the Legislature=s concern. See *In the Matter of Care and Treatment of Ingrassia v. State*, 103 S.W.3d 117 (Mo. Ct.

App. E.D. 2002) (holding that the “escape rule” applies to a sexually violent predator who forfeits his appeal when he escapes custody while his appeal is pending).

Missouri courts have determined that sexually violent predators are not a suspect class for equal protection review. *State ex. rel. Nixon v. Askren*, 27 S.W.3d 834, 842 (Mo. Ct. App. W.D. 2000). In *Askren*, the court determined that the state’s right to pursue a jury trial, over the objections of the committee, serves a rational purpose in these cases. As the court stated:

Such a person has already served his designated sentence for violating the criminal law, but because of lack of volitional capacity in the area of sexual deviancy, it cannot be assumed that the person’s punishment had any deterrent effect on future conduct.

Id. Because Mr. Norton has also displayed a lack of volitional capacity based on his past criminal history and failure to complete sex offender treatment, the state has a rational basis in determining he is more likely than not to reoffend unless he is treated in a secure facility. For sex offenders, like Mr. Norton, who are especially difficult to treat and pose a higher risk of reoffending, it is rational for the state to house them in a facility to receive the treatment they need while protecting the public until such time as the treatment has changed their behavior so that they are no longer predisposed to commit any sexual offenses.

Moreover, the has balanced the limits on where a sexually violent predator may be housed by providing the person with an annual review of his condition to determine if his

mental abnormality has so changed that it would be safe to release him.

' 632.498. The state has the burden of proving beyond a reasonable doubt that the person's abnormality remains such that he is not safe to be at large and that if released is likely to engage in acts of sexual violence. *Id.* Given this opportunity for regular review, the has appropriately balanced the rights of Mr. Norton with the need to protect the public.

This Court should affirm the probate court's decision to commit Mr. Norton to a secure facility for treatment under the custody of the DMH without considering less restrictive alternatives.

iii.

The probate court did not err in denying Mr. Norton's motion to dismiss because Mr. Norton is not entitled to an examination by a psychiatrist or psychologist before the state files a petition seeking to commit Mr. Norton as a sexually violent predator in that the state has a rational basis for using clinical social workers trained in conducting these examinations within the Department of Corrections.

In Point II of Appellant's Brief, Mr. Norton claims he is treated differently than other sexually violent predators, specifically those subject to ' 632.484, in that he is not evaluated by a psychiatrist or psychologist before it is determined that he may be a sexually violent predator. *Appellant's Brief* at 41. He argues that had he been evaluated by a psychiatrist or psychologist as that statute requires, the Attorney General could not have filed a petition because the psychiatrist in this case, Dr. Rabun, determined that Mr. Norton

did not suffer from a mental abnormality. (L.F. 201).

While Mr. Norton's results oriented argument is creative, he fails to meet the burden of showing that the state has no rational basis for allowing a professional other than a psychiatrist or psychologist to review possible sexually violent predators under ' 632.483 while requiring that the review be conducted by a psychiatrist or psychologist under ' 632.484. Mr. Norton does not show that he is a member of a suspect class and cannot establish that he has a fundamental right to be screened by a psychiatrist or psychologist at his end of confinement interview. As stated earlier, when a statute is not alleged to have impinged on a fundamental right nor applied to the detriment of a suspect class, it survives an equal protection challenge where the state shows that the statute is rationally related to a legitimate state interest. *Etling v. Westport Heating & Cooling Services, Inc.*, 92 S.W.3d 771, 774 (Mo. banc 2003).

There are at least three reasons why the state makes this rational distinction in the two sections. First, those subject to the review under ' 632.483 are currently under the jurisdiction of either DOC or DMH and are not being suddenly taken from the community into custody as are those subject to ' 632.484. Second, a clinical licensed social worker employed by DOC is competent, based upon training and experience, to make a finding that a person ~~A~~may meet the definition of a sexually violent predator. Third, a person subject to ' 632.483 has generated other institutional records by virtue of his tenure at DOC or DMH whereas a person committed under the provisions of ' 632.484 may not have the same documentation for use by the reviewer ~~B~~ hence the importance of having a psychiatrist or

psychologist perform the review.

Section 632.483 provides the referral procedure for sex offenders that the DOC has identified as possible sexually violent predators. A review of the multiple steps that must take place **prior to** the Attorney General filing a petition to commit illustrates that the initial decision to refer serves little more than a screening function. If it appears to the DOC that a person may meet the criteria of a sexually violent predator, it provides written notice to the Attorney General and a seven member multidisciplinary team of that fact. ' 632.483.1. Along with this notice, the DOC shall provide the person's offense history as well as documentation of any institutional adjustment and any treatment received or refused, including the Missouri Sexual Offender Program (MOSOP). ' 632.483.2. After receiving notice, the multidisciplinary team has thirty days to assess whether or not the person meets the definition of a sexually violent predator and notify the Attorney General of its assessment. ' 632.483.4. A five member prosecutors-review committee also reviews the records of each person referred to the Attorney General. ' 632.483.5. The committee makes its own determination as to whether the person is a sexually violent predator. *Id.* If it appears that the person may be a predator and the prosecutors-review committee determines by majority vote that the person meets the predator definition, the Attorney General may file a petition alleging that the person is a sexually violent predator. ' 632.486.

The multi-step screening process established in ' 632.483 provides the best explanation why the Legislature did not require the initial screening to be conducted by a psychiatrist or psychologist.⁴ For an offender like Mr. Norton, the DOC is in the best position to evaluate whether he may be a sexually violent predator. He had been sentenced to DOC for five years. (L.F. 25). While Mr. Norton completed Phase I of the MOSOP, he did not complete Phase II despite two opportunities to do so. (L.F. 34-35). These and other records were readily available to Ms. Kelley when she interviewed Mr. Norton. (Tr. 433). At trial, Ms. Kelley testified that she had performed between fifty and sixty end of confinement evaluations. (Tr. 434). Of those, she said that only five offenders had met the criteria of a sexually violent predator. (Tr. 434). Given the experience developed by

⁴ Subsequent to the Attorney General filing the petition to commit Mr. Norton, the Legislature amended ' 632.483 to require that the agency referral include a determination by a psychiatrist or psychologist whether the person meets the definition of a sexually violent predator. Respondent attaches SB 87 (2001) and SB 969 (2002) to illustrate the subsequent changes to this statute.

professionals like Ms. Kelley, it is well within their expertise to determine if an offender may meet the definition of a sexually violent predator.

Conversely, a person evaluated under ' 632.484 does not necessarily have an institutional history like Mr. Norton. Moreover, the process for initiating a commitment of a person under this section is far more streamlined. Once a law enforcement agency notifies the Attorney General that a person who has been convicted of a sexually violent offense but is not currently in custody may meet the definition of a predator, the attorney general may file a petition to detain **and evaluate** the person for a period of up to nine days.

' 632.484. If the court determines that the person may meet the definition of a sexually violent predator, the court shall order the detention and transport the person to the DMH.

Id. At that point, a psychiatrist or psychologist determines whether or not the person meets the definition. *Id.*

Section 632.484 recognizes that, because there may be no previous evaluation records, an evaluation must be conducted. Given that a law enforcement officer makes the initial determination that a person may be a sexually violent predator, there is a greater need for a psychiatrist or psychologist to perform the evaluation in these cases. In virtually all cases, the officer making the referral (unless his experience includes treating and evaluating sex offenders) will not have the same level of experience in diagnosing sex offenders as does a clinical social worker. There is a rational basis to have the psychiatrist or psychologist make the evaluation for this referral - the evaluation must be done quickly, there is likely less written material to rely on, and the initial determination is made by a law

enforcement officer who does not have the experience in making these determinations.

This Court should hold that because the Legislature has a rational basis for allowing a professional other than a psychiatrist or psychologist to conduct the end of confinement evaluation, Mr. Norton has not been denied equal protection vis-a-vis persons who are evaluated pursuant to ' 632.484.

CONCLUSION

Mr. Norton challenges the Sexually Violent Predator law on equal protection grounds. The Legislature has a rational basis for enacting distinct procedures for these offenders - persons found beyond a reasonable doubt to be sexually violent predators pose a high risk of reoffense and a real threat to the public if released before successfully recovering from their mental abnormalities. For these reasons, the Sexually Violent Predator law satisfies equal protection. As Mr. Norton's constitutional claims are not real or substantial, this Court has jurisdiction and should affirm the judgment of the probate court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the foregoing were mailed, postage prepaid, via United States mail, on this 22nd of August, 2003, to:

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CERTIFICATION OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief complies with the limitations contained in Rule 84.06, and that the brief contains 5,834 words.

The undersigned further certifies that the disk simultaneously filed with the hard copies of the brief has been scanned for viruses and is virus-free.

James H. Klahr

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